UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SW DESIGN SCHOOL, LLC, d/b/a
INTERNS4HIRE.COM AND d/b/a K12CODERS,
AND SW DESIGN SCHOOL, L3C, A SINGLE-
INTEGRATED BUSINESS ENTERPRISE AND/OR
EMPLOYER

and

MATTHEW HYSON, AN INDIVIDUAL Case 5-CA-243576

COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS AND BRIEF IN SUPPORT

Paul J. Veneziano
Counsel for the General Counsel
National Labor Relations Board, Region Five
Washington Resident Office
1015 Half Street SE, Suite 6020
Washington, D.C. 20570
Telephone: (202) 273-1709
Fax: (202) 208-3013
paul.veneziano@nlrb.gov

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, counsel for the General Counsel files the following Exceptions to the decision of the Honorable Michael A. Rosas, Administrative Law Judge (ALJ), in his June 8, 2020 decision.

I. STATEMENT OF THE CASE

Upon charges filed by Matthew Hyson (Hyson), on June 20, 2019,[1] and amended on August 1, 2019, October 25, 2019, and February 13, 2020, the Acting Regional Director issued a Complaint and Notice of Hearing (Complaint) alleging that SW Design School, LLC d/b/a Interns4Hire.com, K-12 Coders, and SW Design School, L3C (Respondent) violated Section 8(a)(1) of the Act in four ways: (1) by promulgating and maintaining a rule on about April 30, 2019, prohibiting employees from discussing wages and compensation; (2) telling employees that they could not discuss wages with each other; (3) discharging Hyson because he violated Respondent's rule prohibiting employees from discussing wages; and (4) discharging Hyson because he engaged in protected concerted activities or because Respondent mistakenly believed Hyson engaged in protected concerted activities. The case was tried before the ALJ on February 24–25 and March 4–5, 2020. At the outset of the hearing on February 24, 2020, counsel for the General Counsel offered—and the ALJ admitted—Amended Complaint into the record.[2] (GC Exh. 500 at 4; see also Tr. 16:12–15, 17:9–10.)[3]

[1] Hereinafter, all dates occur in 2019 unless otherwise noted.

[2] In these Exceptions and Brief in Support, citations to the transcript appear as "Tr. [page numbers]." Citations to the General Counsel's exhibits appear as "GC Exh. [exhibit number]," and citations to Respondent's exhibits appear or "R Exh. [exhibit number]." Citations to the ALJ's decision appear as "ALJD [page numbers]."

[3] GC Exhibit 500 inadvertently plead the third amended charge as having been filed on February 13, 2019, instead of February 13, 2020. However, the formal papers include the charge and the Region's docketing letter which transmitted a copy of the charge. (GC Exh. 1–N; GC Exh. 1–P.) The third amended charge and the Region's docketing letter are properly dated. (GC Exh. 1–N; GC Exh. 1–P.)

On June 8, 2020, the ALJ issued his decision concluding that Respondent constituted a single business enterprise within the meaning of the Act. The ALJ also concluded that Respondent violated Section 8(a)(1) by: (1) maintaining a rule prohibiting employees from discussing their wages; (2) enforcing the rule prohibiting employees from discussing their wages by telling employees on April 30, 2019, that Respondent's rules prohibit employees from discussing their wages; and (3) discharging Hyson on May 16, 2019, for engaging in protected activities.[4] In addition to determining that the unfair labor practices affected commerce within the meaning of section 2(6) and 2(7) of the Act, the ALJ concluded that Respondent had not otherwise violated the Act as alleged in the Complaint. The ALJ issued an errata on June 10, 2020 correcting typographical errors in the ALJD.

II. FACTS

A. Respondent's Business

Tarsha Weary (Weary) has created a network of three business entities across three jurisdictions under the name of SW Design School. In 2014, Weary incorporated a SW Design School, LLC in Michigan to "[o]perate as an online entrepreneurial school that will teach individuals how to successfully start, market, and grow a business." (GC Exh. 2–A.) In 2015, Weary amended the Michigan entity's articles of incorporation to become a low-profit limited liability company, also known as an L3C, now known as SW Design School (Michigan L3C). (GC Exh. 2–B; GC Exh. 3–B at 2.) Until February 2020, Michigan L3C operated a website at www.thecareerleaders.co.[5] (Tr. 27:3–33:15.)

[4] The ALJ's conclusion appears to be based on his analysis of whether the Employer terminated Hyson pursuant to an unlawful rule rather than protected concerted activity. (See ALJD at 14:12–17:34.)

[5] Although the website address is www.thecareerleaders.co, e-mail addresses for the company end with thecareerleaders.com. (Tr. 28:1–7.)

In 2015, Weary incorporated a separate limited liability company named SW Design School, LLC in Maryland. (GC Exh. 11 at 1; GC Exh. 12 at 2). In 2016, Weary requested and received a trade name for the Maryland entity. (GC Exh. 13 at 1, 3.) After approval, the Maryland entity began trading as Interns4Hire.com (Interns4Hire). (GC Exh. 13 at 3; GC Exh. 14; Tr. 25:14–18, 175:11–19.) During the relevant period, Interns4Hire's facility was located at 201 Ritchie Road, Capitol Heights, Maryland (Capitol Heights office). (GC Exh. 14; Tr. 59:1–60:1, 180:9–25.) Interns4Hire shares the Capitol Heights office building with a print shop. (Tr. 59:1–60:1, 62:11–15.)

In addition to providing graphic and web-design services, Interns4Hire also partners with state and local governments to train individuals with new skills. Interns4Hire also hires individuals itself and places those employees at Interns4Hire client locations. (Tr. 89:22–25, 91:4–92:24, 93:1–14, 94:20–24; 224:1–14, 226:2–19, 228:23–229:12, 384:21–385:10, GC Exh. 23 at 3–4, 16–17; GC Exh. 27; GC Exh. 28; GC Exh. 29; GC Exh. 30; GC Exh. 32.)

In January 2019, Weary and her Michigan L3C entity organized a new limited liability company in Washington, D.C. (GC Exh. 4 at 1–2.) The Washington, D.C.-based entity was also known as SW Design School, LLC. (Ibid.) At the same time, Weary registered K-12 Coders as the trade name for the entity based in Washington, D.C. (K-12 Coders). (GC Exh. 5; GC Exh. 6; GC Exh. 9–B; GC Exh. 9–C.) K-12 Coders provides after-school programs and camps at different locations in Washington, D.C., including D.C. public schools, teaching entrepreneurial skills to students ranging from elementary school to high school. (*See, e.g.*, GC Exh. 7–C; GC Exh. 10–G at 1; GC Exh. 56 at 2; GC Exh. 57; Tr. 35:15–36:16, 243:9–17, 384:2–12, 447:20–448:4.) Weary created K-12 Coders as a pilot project to test the market and prove that a

business providing after-school programs teaching entrepreneurial skills to kindergarten through 12th grade students could be successful. (Tr. 84:19–85:2, 86:8–10, 102:12–103:1, 471:16–17.)

Weary is the sole member of both the K-12 Coders and the Interns4Hire entities, and she considers the Michigan L3C to be the "exact same company" as K-12 Coders. (Tr. 33:5–15, 33:16–22, 166:22–167:4; see also GC Exh. 2–A; GC Exh. 2–B; GC Exh. 2–C; GC Exh. 4 at 2; GC Exh. 5 at 1; GC Exh. 7–C; GC Exh. 8 at 2; GC Exh. 11 at 3; GC Exh. 12 at 1–2; GC Exh. 13 at 1.) Accordingly, Weary is the person who makes business decisions, including the types of business K-12 Coders and Inters4Hire will pursue. (Tr. 33:23–34:18.) Weary also decides what types of business relationships Interns4Hire has with other business. (Tr. 35:1–4.) Interns4Hire has employees, and Weary is involved in hiring those employees and assigning them tasks. (Tr. 35:5–10; see, e.g., GC Exh. 23 at 3, 7–18.) K-12 Coders does not directly employ anyone besides Weary. (Tr. 28:8–11, 34:9–14.)

B. Respondent's After-School Programs

Since at least February, Respondent has provided after-school programs in Washington, D.C.-area schools. (See Tr. 223:23–224:21, 240:18–24, 243:3–25, 379:1–14, 384:2–385:10, 412:9–19; GC Exh. 27 at 1; GC Exh. 28 at 1; GC Exh. 30.) Respondent's after-school programs teach children skills like coding and entrepreneurship using soap and candle-making equipment, computers, iPad programs, as well as a piece of machinery called a Cricut machine. (Tr. 36:2–16, 243:11–17, 244:24–245:13, 384:4–12, 447:20–448:4; GC Exh 3–J; GC Exh. 3–L; GC Exh. 7–C; GC Exh. 10–A; GC Exh. 10–C; GC Exh. 10–G; GC Exh. 10–H at 9; GC Exh. 51 at 10; GC Exh. 52 at 10; GC Exh. 53 at 10; GC Exh. 56 at 2; GC Exh. 57.) A Cricut machine is approximately the size of an inkjet printer. (Tr. 245:14–19; see also GC Exh. 48.) The machine has a small, removeable blade inside a cartridge which allows users to cut vinyl designs.

(Tr. 505:11–13, 505:23–24, 507:25–508:2, 516:22–23; GC Exh. 48.) Respondent owned either four or five Cricut machines. (Tr. 404:20–21, 513:25–514:1.) One of Respondent's Cricut machines had been missing a blade since about January. (Tr. 379:8–11, 405:10–12.)

Because K-12 Coders has no employees of its own, Weary places Interns4Hire employees at K-12 Coders' locations. (Tr. 93:1–14, 94:20–95:15, 223:23–224:21, 240:18–24, 243:3–25, 379:1–14, 384:2–385:10, 412:9–19; GC Exh. 23 at 13, 16–17; GC Exh. 32.) Weary alone made the decision to place Interns4Hire employees at K-12 Coder job sites. (Tr. 101:24.) Although K-12 Coders does not directly employee individuals, it did maintain an employee handbook until about late June.[6] (See GC Exh. 21, GC Exh. 23 at 6; 386:22–387:1, 419:17–20, 421:19–21, 423:5–16.) Interns4Hire employees working at K-12 Coders jobsites were required to review, sign, and adhere to the rules in the K-12 Coders Handbook. (GC Exh. 21 at 2; GC Exh. 23 at 4–5; Tr. 244:9–21, 437:22–438:2, 441:7–22.) Weary also read the handbook's provisions aloud to Interns4Hire employees during training. (Tr. 456:16–25.) The K-12 Coders Handbook prohibited Interns4Hire employees from discussing their wages and working conditions with each other. (GC Exh. 21 at 2; GC Exh. 23 at 5; Tr. 252:25–253:3, 386:22–387:1, 391:13–18, 419:17–20, 421:19–20, 423:5–16, 441:7–22.) Interns4Hire's dress code also required employees to wear K-12 Coders-branded tee shirts. (Tr. 225:23–226:1. 245:25–246:4, 386:13–14; GC Exh. 32.)

Respondent pays its employees on an hourly basis. (See Tr. 240:11–14, 426:8–10; GC Exh. 27 at 1; GC Exh. 30.) Respondent uses a smartphone application known as "When I Work" to track attendance. (Tr. 207:1–23, 257:13, 385:16–24.) "When I Work" is a location-

[6] Respondent destroyed all copies of handbook in late June, after receiving the initial charge in this matter and providing an excerpt of the handbook in Respondent's June 24 position statement to the Regional Office. (GC Exh. 23 at 6; Tr. 129:24–131:15, 134:11–24, 192:22–194:13.)

based smartphone application that only permits employees to clock-in or clock-out when the employees are physically present at Respondent's Capitol Heights office or after-school program job sites. (Tr. 207:1–23, 257:13, 385:16–24.) However, repeated "glitches" with "When I Work" prevented employees from properly clocking in or clocking out. (Tr. 385:24–386:5.)

On a typical day, Respondent's employees first visit Respondent's Capitol Heights facility to complete trainings and to pick up supplies for use in Respondent's after-school programs. (Tr. 243:20–25.) Employees then travel to Respondent's after-school program job locations. (Tr. 243:20–25, 259:2–21, 266:23–267:6, 391:21–392:6.) However, Respondent does not pay employees for their travel time between Respondent's Capitol Heights office and after-school program job sites. (Tr. 259:2–21, 259:2–21, 266:23–267:6, 391:21–392:5.) Instead, Respondent's travel pay policy requires employees to clock-out when they left the Capitol Heights office and clock-in when they began working at Respondent's after-school program job site. (Tr. 391:21–392:5.) At least one of the reasons that Respondent did not pay for travel time was that on-the-clock travel created a "liability" for Respondent. (Tr. 394:4–6.)

By March, Respondent began providing its after-school programs at Eastern High School and one other school in Washington, D.C. (See GC Exh. 32 (instructing Hyson to report to Eastern High School); GC Exh. 23 at 16 (mentioning a job assignment to another unnamed location.)) In about April, Respondent expanded to third school. (GC Exh. 37.) Respondent's three school locations at the time were Eastern High School, Boone Elementary (Boone) and Navel Thomas Elementary in Washington, D.C. (Tr. 384:21–385:1; GC Exh. 10–G at 1.) At some undetermined point, Respondent's Cricut machine that was missing its blade had been transported to Boone. (Tr. 404:20–405:2.) Without the blade, Respondent's employees at Boone could not complete the Cricut station with students. (Tr. 405:5–6.)

C. Hyson's Experience With Respondent

On January 30, Hyson sent Weary an e-mail explaining that Maryland's apprenticeship program had referred him to Weary and expressing his interest. (GC Exh. 25 at 1; Tr. 222:9–21, 236:16–237:8.) Weary referred Hyson to thecareerleaders.co/apprenticeship, and Hyson completed the online application. (GC Exh. 25 at 2; GC Exh. 26 at 1; Tr. 222:9–15, 237:8–9.) Weary also requested a link to Hyson's graphic design work, and Hyson complied. (GC Exh. 25 at 2; Tr. 222:22–223:4, 237:8–12.) On February 7, Weary arranged a virtual interview with Hyson so that Weary could evaluate Hyson's skills on a hypothetical design project Weary assigned to him. (GC Exh. 26 at 3–4; Tr. 223:5–21, 237:15–238:6, 238:17–24.)

On February 14, Weary offered Hyson a position as a STEM Aide at $18 per hour. (GC Exh. 27; Tr. 224:1–3, 240:12–14.) Hyson accepted Weary's offer just 11 minutes later. (GC Exh. 27; Tr. 240:16–17.) On February 25, Hyson arrived at Respondent's Capitol Heights office to begin training. (Tr. 240:20–241:7.) Hyson met with Weary and another employee starting training that day. (Id.) Weary explained that Interns4Hire's employees would staff K-12 Coders' after-school programs teaching coding and entrepreneurship to students. (Tr.243:11–17; see also 225:1–3 (acknowledging that Weary provided details to Hyson regarding his job responsibilities and details during training).) Weary also explained that employees' workday consisted of two parts: (1) on-going training at Interns4Hire's Capitol Heights office; and (2) field work at K-12 Coders' Respondent's after-school program job sites. (Tr. 243:20–25.) Weary also explained that employees were responsible for their own travel between locations and that reliable transportation was a job requirement. (Tr. 244:3–5.) In addition, Weary presented Hyson and the other employee in training a copy of the K-12 Coders Employee handbook. (See Tr. 244:9–10.) Weary also stated that employees were required to sign a copy

of the K-12 Coders handbook before beginning work with Respondent. (Tr. 244:12–13; see also GC Exh. 23 at 4–5 (explaining that employees were required to sign the K-12 Coders Handbook before beginning work).) Hyson later signed a copy of the handbook. (Tr. 244:19–21.)

During Hyson's first week, Weary trained him regarding the different types of equipment that Respondent used in its after-school programs, including Respondent's Cricut machines. (Tr. 244:24–245:13.) In fact, Respondent had Hyson use the Cricut machine to produce his own company tee shirt. (Tr. 245:23–246:1.) Respondent's company tee shirts were black with a gold K-12 Coders logo. (Tr. 246:2–4.)

In March, Hyson received an offer for a temporary position with Johns Hopkins University (Johns Hopkins). (Tr. 228:7–10, 247:17–248:1, 306:7–13, 308:21–24.) Hyson asked Weary to hold his position while he worked with Johns Hopkins. (Tr. 248:1–248:3.) Weary agreed to hold Hyson's position for a month. (Tr. 228:11–12, 248:4–8.)

On April 26, Hyson sent Weary an e-mail explaining that he had completed his work with Johns Hopkins and that he was ready to return to work with Respondent. (GC Exh. 37 at 1; Tr. 228:13–16; 248:14–16.) Weary promptly welcomed Hyson back to Respondent, and she agreed that Hyson could return to the Capitol Heights office on April 30. (GC Exh. 37 at 1; Tr. 228:17–19, 248:18–19.) In addition to explaining that Hyson needed to submit additional paperwork, Weary explained that she had "completely changed the program" and expanded to a third school. (GC Exh. 37 at 1, Tr. 248:19–21.) Finally, Weary agreed to add Hyson to Respondent's attendance software. (GC Exh. 37 at 1.)

Hyson returned to Respondent's Capitol Heights office on April 30. (Tr. 249:2–6.) When Hyson arrived, he found some familiar faces and some new faces. (Tr. 249:6–8.) One person Hyson recognized was Stacey Walker. (Tr. 249:11–12.) As Stacey Walker and Hyson

sat at a table in Respondent's office, Stacey Walker explained changes that Respondent had made to the company since Hyson had briefly left to work at Johns Hopkins. (Tr. 249:13–23, 251:3–9, 389:11–12.) Specifically, Stacey Walker told Hyson that she had been promoted and taken on additional responsibilities.[7] (Tr. 251:7–9, 389:6–14.) After Hyson congratulated Stacey Walker for her promotion, Hyson asked Walker whether she had also received a raise. (Tr. 252:22–23, see also Tr. 390:9–10.) Stacey Walker refused to discuss her wages. (Tr. 252:24–25, 390:12–13.) Stacey Walker also stated that Respondent's employment policies prohibited employees from discussing wages with each other. (Tr. 252:25–253:3, 390:14–16.)

In addition, Hyson stated that he did not want to make Stacey Walker feel uncomfortable, Hyson stated that Respondent's rule was illegal under that National Labor Relations Act. (Tr. 253:5–12, 390:17–18; GC Exh. 23 at 5.) Hyson explained that the Act protected certain employee rights, including the right to discuss wages. (Tr. 253:10–12, 391:2–3; GC Exh. 23 at 5.) Further, Hyson explained that a previous employer had tried to institute a rule prohibiting employees from discussing wages. (Tr. 253:16–18, 254:4–5, 390:20–25.) Hyson also explained that he had done some research at the time, found a Monster.com article explaining an employee's rights under the Act, and sent a copy of the article to his previous employer.

[7] Stacey Walker began training with Respondent in January and began working as a STEM Aide on February 18. (Tr. 379:8–14.) Respondent promoted Stacey Walker to STEM Aide Supervisor in about April. (Tr. 379:18–24, 382:21–22, 416:3–6.) At the time, Weary met with Stacey Walker to explain her new duties. (Tr. 380:24–381:5.) Weary made Stacey Walker responsible for attendance and ensuring Respondent's employees were prepared and available for work. (Tr. 380:2–6, 381:8–12.) In about May, Respondent granted Stacey Walker authority to hire, discipline, and recommend that Respondent terminate employees. (Tr. 381:23–383:2, 416:24–417:12.) Weary specifically told Stacey Walker that she trusted Walker's instincts and decision making. (Tr. 382:7–11.) In addition, Stacey Walker served as Respondent's point person for Respondent's "When I Work" smartphone application. (Tr. 257:12–21, 260:14–20, 264:6–20, 266:16–21, 272:18–273:15, 277:11–19, 386:6–8.) Stacey Walker also created employee schedules that Weary routinely approved. (Tr. 416:13–23.) Stacey Walker left Respondent's employ in about August. (Tr. 142:7–12.)

(Tr. 253:18–254:2, 254:4–5; see 390:25–391:3.) In addition, Hyson explained that his previous employer had ultimately reversed the policy. (Tr. 254:1–5.) Hyson then e-mailed a copy of the Monster.com article to Stacey Walker. (Tr. 254:6–10, 444:23–445:12, 454:9–21; GC Exh. 38; GC Exh. 39.) Stacey Walker informed Hyson that he should bring any complaints he had regarding Respondent's wage discussion policy directly to Weary. (Tr. 393:16–21, 454:18–21; GC Exh. 23 at 5.) That same day, Stacey Walker informed Weary that Hyson had asked about Stacey Walker's wages. (See Tr. 395:6–15, 445:6–12; GC Exh. 38; GC Exh. 39.) Stacey Walker also explained that Hyson had e-mailed a copy the Monster.com article. (Tr. 445:9–12.)

Between April 30 and May 11, Hyson focused on collecting the documents Weary identified in her April 26 e-mail message. (Tr. 256:6–8.) As Hyson collected documents, he provided them to Stacey Walker. (Tr. 256:12–15, 438:21–22.) On May 2 and May 3, Hyson sought Weary's permission to not visit Respondent's Capitol Heights office. (GC Exh. 23 at 14–15.) Each time, Weary specifically instructed Hyson to contact Stacey Walker about his absence. (Ibid.) Weary stated that Hyson should contact Stacey Walker because Weary did not "handle attendance issues anymore." (GC Exh. 23 at 15; Tr. 221:17–222:8.) On May 11, Respondent placed Hyson at Boone as Center Director beginning on May 13. (Tr. 256:16–257:4; GC Exh. 23 at 17.) As a Center Director, Hyson would earn $20 per hour, rather than $18 per hour as a STEM Aide. (Tr. 257:1–4; GC Exh. 23 at 17.)

On May 13, Hyson reported to Respondent's Capitol Heights office. (Tr. 257:9–11.) Upon arriving, Hyson tried to clock-in using Respondent's smartphone app. (Tr. 257:13.) Although Hyson had a "When I Work" account, he was unable to clock-in. (Tr. 257:14–17.) Accordingly, Hyson explained his inability to clock-in to Stacey Walker, who eventually rectified the issue so that Hyson could clock-in himself. (Tr. 257:19–21, 260:14–18.)

After speaking with Stacey Walker, Hyson next introduced himself to his new co-workers at Boone, E'Amanda Walker and Niema Fields (Fields). (Tr. 258:5–8, 397:1–18.) Because E'Amanda Walker and Fields did not have their own transportation, his co-workers asked Hyson for a ride to Boone in his car each day. (Tr. 259:8–13.) When Weary arrived in the Capitol Heights office, Hyson therefore asked whether Respondent would compensate Hyson for travel time or reimburse him in any way. (Tr. 259:5–13.) Hyson expressed that his wife had been involved in a hit-and-run accident while working and had encountered problems with the worker's compensation program. (Tr. 333:18–22, 334:15–22, 336:6–9.) Hyson therefore expressed his concerns for his personal liability if an incident occurred while he traveled for work off-the-clock. (Tr. 337:6–22.) Weary stated that reliable transportation was a requirement for the job. (Tr. 259:17–19.) Weary further stated that Respondent would not reimburse Hyson for his travel expenses, but he was welcome to ask his co-workers to reimburse Hyson for the money he spent on gas. (Tr. 259:19–21.)

After Hyson and his Boone co-workers finished collecting supplies at Respondent's Capitol Heights office, they gathered Respondent's bins, crates, and K-12 Coders-branded backpacks for transport to Boone. (Tr. 260:6–13.) Respondent provided its after-school program in an art classroom at Boone. (Tr. 261:12–262:10.) The art classroom included a closet were Respondent stored supplies on-site. (Tr. 261:18–20.) Respondent had also been storing some equipment in the classroom, including a Cricut machine. (Tr. 262:1–7; see also Tr. 62:9–11 (Weary acknowledging that Respondent stored equipment at K-12 Coders facilities).)

Once children arrived for the after-school program, Hyson taught the coding station, the iPad station, and the design station using the Cricut machine. (Tr. 262:12–20.) But when Hyson tried to use the Cricut machine, he noticed that the machine's blade and blade cartridge were

missing. (Tr. 262:21–263:2.) Hyson asked his co-workers if they had seen the blade, but they had not. (Tr. 263:3–9.) However, Hyson's co-workers noted that Respondent maintained an extra Cricut machine in the Capitol Heights office and suggested the employees could use the blade cartridge and blade from a second machine until they located or replaced the blade and blade cartridge in the Cricut machine at Boone. (Tr. 263:18–21.) For the rest of the day, Hyson focused his instruction on the design software and other stations. (Tr. 263:12–15.)

When Hyson arrived for work on May 14, he was again unable to clock-in. (Tr. 264:3–7.) Again, Hyson informed Stacey Walker about the problem. (Tr. 264:9–11.) Again, Stacey Walker told Hyson that she would address the issue and let him know when he could clock-in. (Tr. 264:19–20.)

After speaking with Stacey Walker, Hyson walked to the area where Respondent stored equipment, including Respondent's Cricut machines. (Tr 264:23–265:1.) Hyson opened one of Respondent's auxiliary Cricut machines and removed its blade cartridge and blade. (Tr. 264:25–7.) Hyson then held the blade cartridge and blade above his head so that they would be visible to all those present at the Capitol Heights office. (Tr. 265:8–9.) Hyson loudly announced to those present—which included Stacey Walker, E'Amanda Walker, Fields, and employees who worked at another school—that he was taking the blade and cartridge with him to Boone. (Tr. 265:9–11, 266:7–10. But see Tr. 406:2–10 (Stacey Walker acknowledging that she was present at the time Hyson announced he was taking the blade cartridge and blade but stating that she did not observe Hyson doing so).) Hyson was unsure of the procedure for checking equipment out of the office, and he wanted to ensure everyone knew he had taken the blade cartridge and blade from a second Cricut machine. (Tr. 265:13–25.) Hyson believed making such an announcement was a safe way to ensure those around him he knew he had taken the cartridge and blade. (Ibid.) After

Hyson's announcement, Hyson placed the Cricut blade cartridge and blade in his pocket and continued gathering supplies for transport to Boone. (Tr. 266:4–6, 266:11–15.)

Weary then arrived in the office. (Tr. 266:23–24.) Weary gathered Respondent's employees and reiterated that Respondent's policy required employees to have reliable transportation. (Tr. 266:24–267:2.) Weary reiterated that Respondent did not to pay employees for their travel. (Tr. 267:2–3, 394:3–13.) Weary encouraged employees to share gas money if a co-worker provided the employee a ride to Respondent's job site. (Tr. 267:4–6, 394:7–13.)

After Weary's announcement, Hyson and his Boone co-workers prepared to leave the office. (Tr. 267:9–10.) Just before loading the supplies in Hyson's car, Hyson took the Cricut blade cartridge and blade out of his pocket. (Tr. 267:15–21.) Hyson then placed the blade cartridge and blade in a six- or seven-inch-deep side pocket of one of the K-12 Coders-branded backpacks employees used to transfer supplies from the Capitol Heights office. (Tr. 267:18–21, 268:21–269:4.) Because E'Amanda Walker held the backpack at the time, Hyson told her that he was putting the blade cartridge into the pocket of the backpack. (Tr. 267:16–268:1.)

Unfortunately, Hyson and his co-workers learned that the blade cartridge and blade had gone missing when they began setting up the Boone art classroom for Respondent's after-school program. (Tr. 268:11–20.) Hyson, E'Amanda Walker, and Fields searched the classroom and the backpacks they had brought to Boone. (Tr. 269:8–269:16.) Hyson even returned to his car to search for the blade cartridge and blade. (Tr. 269:19–269:4.) But Hyson and his co-workers could not locate either piece. (Tr. 269:15–17, 270:3–4.) Hyson stated that he believed the blade cartridge and blade were his responsibility, that he would continue searching for them, and that he would let Respondent know if he could not find them and that he would buy a replacement. (Tr. 270:14–19.) E'Amanda Walker and Fields agreed with Hyson's plan. (Tr. 270:20–21.)

At the end of Respondent's after-school program on May 14, Hyson learned that he needed to return Respondent's laptop computers to the Capitol Heights office to be charged. (Tr. 270:24–271:9.) When Hyson arrived at the office, he found Respondent's door was locked. (Tr. 271:20–21.) Hyson pounded loudly on the door, and the owner of the print shop with whom Respondent shared the Capitol Heights office eventually unlocked the door. (Tr. 272:2–5.) That experience—transporting Respondent's equipment while off-the-clock—concerned Hyson. (Tr. 271:15–17, 271:22–272:1, 272:9–17.) After Hyson arrived at home, he conducted internet research to learn about employees' rights to be paid for their travel time. (Tr. 272:9–17.)

On May 15, Hyson was again unable to clock-in when he arrived for work. (Tr. 272:18–273:19.) Hyson again informed Stacey Walker of the problem, and she again agreed to address the issue. (Tr. 273:23–274:15.) But this time, Hyson's conversation with Stacey Walker continued when Hyson asked Stacey Walker to discuss Respondent's travel pay policy. (Tr. 273:16–274:4, 393:12–15.) Hyson explained the issues he had encountered returning Respondent's laptops the previous evening, and he stated that he was concerned that Respondent's policy required employees to travel between locations while off-the-clock. (Tr. 273:24–274:3.) Walker responded that Weary had stated Respondent's travel pay policy many times and that employees' travel time between the Capitol Heights office and their job site was to be considered a lunch break. (Tr. 274:6–11, see 392:21–393:5.) Hyson disagreed, stating that he could simply take his lunch break at the Capitol Heights office and that Respondent was requiring Hyson to travel to another location during his lunch break. (Tr. 274:13–20.) After Stacey Walker told Hyson that she could not do anything about the policy, Hyson was dissatisfied and explained that he would continue researching the travel pay policy issue and let Stacey Walker know what he learned. (Tr. 274:21–275:8.) Stacey Walker again informed

Hyson that he should discuss any issues regarding the policy with Weary. (Tr. 393:13–15, 394:1–2.) Stacey Walker also informed Weary that Hyson had expressed concerns regarding Respondent's travel pay policy. (Tr. 394:2–3, 394:14–23.)

After Hyson's conversation with Stacey Walker, Hyson and his Boone co-workers gathered their supplies and packed Hyson's car to travel to Boone. (Tr. 276:1–4.) On the way, E'Amanda Walker and Fields each gave Hyson $20 in gas money for the week. (Tr. 276:14–17.) Hyson first thanked E'Amanda Walker and Fields for their generosity. (Tr. 276:20–21.) Hyson then stated that he did not believe it was fair for Respondent to ask E'Amanda Walker and Fields to provide Hyson with gas money when Hyson believed it was Respondent's responsibility to pay all three employees for their travel. (Tr. 276:21–24.) As Hyson recalled, E'Amanda Walker and Fields responded with "mild disinterest." (Tr. 277:3–4.)

In a telephone call later that day, E'Amanda Walker and Fields told Stacey Walker and Weary that Hyson had discussed Respondent's travel pay policy. (See Tr. 397:24–398:4, 399:6–14, 399:24–400:22, 403:15–19). Stacey Walker also testified that E'Amanda Walker and Fields told Stacey Walker and Weary that Hyson had asked E'Amanda Walker and Fields about their pay. (Tr. 397:24–398:5, 399:6–14.)[8]

At 7:30 p.m. on May 15, Stacey Walker sent Weary a text message regarding the misplaced Cricut blade cartridge (GC Exh. 1–I at 23.)[9] Stacey Walker explained that E'Amanda Walker told Stacey Walker that Hyson had lost the blade after having it in his pocket. (Ibid.) Stacey Walker also claimed that Hyson told E'Amanda Walker not to say anything until the

[8] Although E'Amanda Walker and Fields informed Respondent that Hyson asked them about their pay, Hyson did not testify about such inquires.
[9] The text message received in evidence is an excerpt which does not reflect the entirety of Stacey Walker and Weary's dialogue.

Boone employees found the missing blade. (Ibid.) Weary responded only that Respondent should let Hyson go. (Ibid.)

However, Respondent took no such steps when Hyson arrived for work on May 16. Instead, Hyson's day began as it had every other day that week: Hyson was unable to clock-in for work. (Tr. 277:9–11.) Once again, Hyson spoke with Stacey Walker about his inability to clock-in. (Tr. 277:14–17.) Once again, Stacey Walker stated that she would take care of the issue. (Tr. 277:18–19.) Hyson was later able to clock-in that day. (Tr. 280:20–21.)

When Weary arrived, she called a staff training about how to connect Respondent's projector to a company laptop, as well as the best practices for teaching one of Respondent's coding programs. (Tr. 278:5–14, 407:20–23.) Stacey Walker led the training. (Tr. 279:21–23.) Because Hyson already knew the skills Stacey Walker was teaching, he passed the time using his smartphone to access Facebook. (Tr. 279:11–20.) Weary saw Hyson on his smartphone and asked if he was recording the meeting. (Tr. 279:8–10, 407:20–23.) Hyson stated that he was not. (Tr. 280:6, 280:11–13.) Weary stated that she did not consent to any recording and such recordings would be inadmissible in court. (Tr. 280:8–10.)

After the training, Weary asked Hyson and Stacey Walker to attend a separate meeting. (Tr. 280:17–19, 407:11–17.) Weary began the meeting by accusing Hyson of complaining about Respondent's wage discussion and travel pay policies to his co-workers. (Tr. 281:4–6, 284:7–10, 407:24–408:14.) Weary stated that she knew Hyson was complaining about Respondent's policies, and Hyson confirmed that he had. (Tr. 281:8–13, 408:15–18.) Weary stated that Hyson should have brought any concerns to Weary and Weary alone. (Tr. 281:14–16; see 408:19–21, 409:16–24.) Weary claimed in passing that Hyson had stolen a blade from Respondent's Cricut

machine, but Hyson explicitly stated that he had not.[10] (Tr. 281:21–282:12; 284:3–5.) Hyson also explained that he had only taken the Cricut blade cartridge and blade because the Cricut machine that had been at Boone was already missing its blade. (Tr. 282:7–12.) Having heard Hyson's explanation, Weary stated that she was letting that issue go because Hyson had discussed Respondent's policies behind her back and shown himself to be untrustworthy. (Tr. 282:14–18, 283:3–7.) Weary further stated that Respondent's handbook prohibited employees from discussing wages, and that Hyson had signed away any right to discuss wages when he signed Respondent's handbook. (Tr. 283:3–7.) Although Hyson explained that maintaining such a rule was illegal, Weary reiterated that Hyson had signed away his right to discuss wages. (Tr. 283:9–18.) Further, Weary stated that Maryland was an at-will employment state, so she could fire Hyson for any reason at any time. (Tr. 283:18–21.) Weary then stated that she did not owe Hyson any explanation beyond that she did not trust him. (Tr. 283:21–23.) Therefore, Weary continued, Hyson was fired. (Tr. 283:23.) Weary also told Hyson that she did not have any complaint about the quality of his work. (Tr. 284:14–18.) Respondent did not provide Hyson with any written documentation of his termination. (Tr. 284:20–22.)

On June 18, Hyson filed the initial charge in this matter. (GC Exh. 1–A.) On June 24, after receiving a copy of Hyson's initial charge and the Board's docketing letter, Weary

[10] Weary's accusation was the first time either Weary or Stacey Walker ever mentioned the missing Cricut blade cartridge and blade to Hyson. (Tr. 284:23–285:5.) Although Stacey Walker testified that she asked Hyson about the blade (Tr. 406:24–407:1), Stacey Walker's text message to Weary indicates that Stacey Walker did not learn about the misplaced blade cartridge until the evening of May 15, which was the night before Hyson's termination meeting. (GC Exh. 1–I at 23.) Stacey Walker also later clarified her testimony. Stacey Walker testified that she asked Hyson why he had not explained that he had taken a second Cricut blade cartridge to replace the missing blade in the machine at Boone. (Tr. 431:18–21.) In response, Stacey Walker testified that Hyson did not give "us" a response besides that Hyson did not know that he had to do so. (Tr. 431:22–24.) Given the timeline and Stacey Walker's reference to "us," the evidence demonstrates that Stacey Walker did not question Hyson until his May 16 termination meeting.

submitted an unprompted statement to the investigating Board agent. (GC Exh. 23 at 1–3; GC Exh. 17; GC Exh. 18.) Respondent's June 24 position statement set forth the reasons Respondent terminated Hyson. (GC Exh. 23 at 4–5.) Respondent's June 24, position statement did not include *any* reference to the Cricut machine at all, let alone as a basis for Hyson's termination. (See generally GC Exh. 23.)

III. EXCEPTIONS

A. Exception 1

1. Exception

Counsel for the General Counsel takes exception to the ALJ's statement that the General Counsel alleges that Respondent promulgated a rule prohibiting employees from discussing compensation on April 30, 2019. (ALJD at 1.)

2. Argument

Although the initial Complaint alleged that Respondent promulgated a rule on April 30, the General Counsel's Amended Complaint clarified the General Counsel's allegations in this matter. (GC Exh. 1–G at 4; GC Exh. 500 at 4; see also Tr. 16:12–15, 17:9–10.) Accordingly, the Board's decision should clarify that Respondent simply maintained a rule prohibiting employee from discussing compensation with each other on about April 30.

B. Exception 2

1. Exception

Counsel for the General Counsel takes exception to the ALJ's statement that the Michigan LLC maintains a place of business in Capitol Heights, Maryland. (ALJD at 2:6–7.)

2. Argument

The ALJ appears to have conflated the places where Michigan L3C, Interns4Hire, and K-12 Coders conducted business. Michigan L3C maintained a place of business in Michigan. See discussion, supra, Part II.A. Weary and the Michigan L3C also incorporated the K-12 entity in

Washington, D.C. Ibid. In contrast, the Interns4Hire entity operated from Capitol Heights, Maryland at all material times. Ibid. Thus, the Board's should clarify the location of each entity.

C. Exception 3

1. Exception

Counsel for the General Counsel takes exception to the ALJ's factual finding that "Hyson testified that his new title as STEM Aide supervisor included overseeing attendance and making sure other employees had the necessary equipment." (ALD at 5 fn. 11.)

2. Argument

The ALJ appears to have conflated testimony from Hyson with testimony from Stacey Walker when he found that Hyson held the title of STEM Aide supervisor, that Hyson oversaw attendance, and that Hyson made sure other employees had the necessary equipment. (ALJD at 5 fn. 11 (citing Tr. 379–80).) Although the ALJ correctly identified Hyson's title as Center Director at other points in his decision (ALJD at 5:20, 9:2–3), the ALJ inadvertently ascribed Stacey Walker's testimony regarding *her* duties to Hyson. In this regard, the Board should conclude that the ALJ erred in describing the record evidence and correct his error.[11]

D. Exception 4

1. Exception

Counsel for the General Counsel excepts to the ALJ's conclusion that Hyson did not engage in concerted activity. (ALJD at 15:4–6, 15:35–36; 16:28–32.)

2. Argument

The ALJ misapplied the Board's test for evaluating whether an employee has engaged in concerted activity because the ALJ did not appropriately weigh the totality of the circumstances

[11] Because the ALJ correctly concluded that Hyson was an employee under the Act (ALJD at 13:3–14:10), the Board should simply clarify the ALJ's error rather than remand the case.

and failed to explain his determination that Hyson did not seek to initiate, induce, or prepare for group action. Here, the General Counsel has argued that Hyson engaged in protected concerted activity on about May 15 when he stated to his Boone co-workers that he did not believe it was fair for Respondent to ask E'Amanda Walker and Fields to provide gas money to Hyson because it was Respondent's responsibility to reimburse employees for work-related travel. The ALJ's analysis erroneously concluded that Hyson's statement to E'Amanda Walker and Fields was not concerted because he was not "seeking to initiate or induce group action regarding travel pay." (ALJD at 16:6–7.) Instead, the ALJ characterized Hyson's statement as "'simply an offhand gripe.'" (ALJD at 16:24–25 (quoting *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019).) Nevertheless, a careful review of the ALJ's analysis shows that he misapplied Board case law.

Although the ALJ acknowledged that the Board applies a totality of the circumstances standard to evaluate whether an employee's complaint is intended to induce group action, the ALJ's erred in applying the Board's standard. The ALJ cited factors that the Board in *Alstate* explained may support an inference that an employee seeks to initiate, induce, or prepare for group action when an employee makes a statement when both employees and supervisors are present. (ALJD at 15:22–33 (citing *Alstate Maintenance, LLC*, above at 5.) But the Board explicitly explained that the facts in *Alstate* did not involve "an employee who addresses one or more coworkers with the object of initiating, inducing, or preparing for group action."[12] *Alstate*

[12] In view of the Board's explicit acknowledgment, the non-exhaustive list of five factors that the *Alstate* Board outlined—and the ALJ appeared to apply—are generally inapposite to the totality of the circumstances in this case. Here, Hyson's made statements to E'Amanda Walker and Fields criticizing Respondent's travel pay policy while outside the presence of supervisors. Thus, ALJ erred in focusing on Hyson's failure to openly protest immediately after Weary's group reiteration of the travel pay policy on May 14. (ALJD at 15:36–39.) Instead, the ALJ should have considered Hyson's conversation with Stacey Walker regarding the Act on April 30 and Respondent's travel pay policy on May 15, as well as Hyson's conversation with Weary on

Maintenance, LLC, above at 7 fn. 45; see also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) ("It is not questioned that conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.") The Board further explained its determination as to whether an employee engaged in concerted activity "remains a factual one based on the totality of the record evidence." *Alstate Maintenance*, above at 7 fn. 45. When an employee speaks with other employees, the question therefore remains whether the totality of circumstances supports an inference that the employee in question acted "with the object of initiating, inducing, or preparing for group action." Id. The Board has also explained that the object of inducing group action need not be express and may be inferred from the circumstances. *Whittaker Corp.*, 289 NLRB 933, 933–34 (1988); see also *Alstate Maintenance, LLC*, above at 8 fn. 45 (reaffirming *Whittaker Corp.*)

Here, Hyson's statement to E'Amanda Walker and Fields on May 15 reflected a continuation of Hyson's effort to engage his co-workers regarding Respondent's working conditions. But rather than consider Hyson's entire course of conduct to determine whether the object of Hyson's entreaty was initiating, inducing, or preparing for group action, the ALJ analyzed each of Hyson's actions in isolation. Addressing each of Hyson's actions individually may have been a first step in framing the analysis, but the ALJ erred when he failed to consider whether Hyson's actions *prior* to his statement to E'Amanda Walker and Fields on May 15

May 13, as evidence that Hyson's made his statement to E'Amanda Walker and Fields with the object of initiating, inducing, or preparing for group action.

supported an inference that Hyson sought to initiate, induce, or prepare for group action when he later criticized Respondent's travel pay policies when speaking privately with his co-workers.[13]

Notwithstanding the ALJ's flawed analysis, the totality of circumstances demonstrate that Hyson sought to initiate, induce or prepare for group action when he spoke with his co-workers regarding Respondent's travel-time policy on about May 15. On April 30, Hyson asked Stacey Walker whether she had received a raise when she was promoted. When Stacey Walker told Hyson that Respondent's rules prohibited employees from discussing their wages, Hyson pushed back. Hyson explained that he had performed research when a previous employer had enacted a rule prohibiting employees from discussing wages. Hyson explained that the NLRA—a statute specifically designed to give employees the right to engage in group action—protected employee rights and prohibited Respondent from interfering with those rights.[14] Hyson further explained

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[13] The ALJD's fundamental flaw is apparent from the first paragraph of the ALJ's legal analysis of Hyson's activities: "Simply making an individual complaint or conversing with others does not constitute concerted activity." (ALJD at 15:19–20 (citing *Alstate Maintenance, LLC*, above at 3).) The ALJ's statement may be accurate as a general principle. But here, Hyson did not simply raise an individual complaint or make isolated or idle conversation with his co-workers. Far from it. In approximately two weeks, Hyson embarked on a consistent campaign to engage his co-workers in improving Respondent's working conditions with each level: owner, supervisor, and employee. In this regard, the ALJ's framing belies his erroneous approach in considering each of Hyson's activities seriatim, rather than in the totality of the circumstances.

[14] In *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985) and *Meyers Industries*, 281 NLRB 882, 887 (1986), (*Meyers II*), aff'd sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988), the Board explained its rationale for overturning *Alleluia Cushion Co.*, 221 NLRB 999 (1975). The *Alleluia Cushion* case presumed concert from an employee's mere assertion of rights under a generally applicable statute. *Meyers I*, above at 495–96. In the *Meyers* cases, the employee in question had simply invoked safety and health statutes in refusing to drive a truck; the decisions do not reference any later or concerted activity intended to enlist the support of fellow employees. See *Meyers I*, above at 497–99; see also *Meyers II*, above at 882 fn. 10 ("[T]here is no evidence in this case that [the employee] joined forces with any other employee in this case or by his activities intended to enlist the support of other employees in a common endeavor . . . . We also note that . . . the General Counsel did not contend that [the employee's] actions constituted activity under 'traditional concepts', rather [the

that his previous employer had changed its policies to conform with the NLRA. Based on Hyson's conversation with Walker, Hyson sent Walker an e-mail with an article about the NLRA. Although Walker is a 2(11) supervisor and 2(13) agent under the Act, see 29 U.S.C. § 152(11) , 29 U.S.C. § 152(13), and discussion, infra, Exception 10, Hyson's conduct demonstrates his interest in employees' rights and collective action.

Hyson's interest in initiating, inducing, or preparing for group action continued when he spoke with E'Amanda Walker and Fields regarding Respondent's travel time pay policy on about May 15. On May 13, Hyson had asked Weary whether Respondent would compensate him for his travel time. Weary explained that Respondent's policy did not compensate employees for travel time, but Hyson was free to request gas money from his Boone co-workers. Notwithstanding Weary's May 14 encouragement to employees to provide co-workers with money to offset gas costs, Hyson alone had to return laptop computers to Respondent's Capitol Heights office later that evening. Unsatisfied with Respondent's travel pay policies, Hyson conducted research—as he had with his previous employer's rules prohibiting wage discussions—regarding Respondent's legal responsibilities to compensate employees for travel time. On May 15, Hyson raised the travel pay policy with Stacey Walker, but remained unsatisfied with Respondent's travel pay policies and informed Stacey Walker that he would continue researching the issue. Later that same day, and in response to E'Amanda Walker and

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General Counsel] relied on the Board's 'expanded' concept of 'concertedness' in *Alleluia* and its progeny."). Thus, *Meyers I* and *Meyers II* removed a presumption of concert under *Alleluia*.

Nevertheless, the Board's conclusion in *Meyers II* does not mean that an employee's assertion of NLRA rights cannot be affirmative evidence demonstrating the employee's object of initiating, inducing, or preparing for group action when the employee engaged in later conduct. Regardless of whether simply invoking the Act when speaking with a supervisor constitutes concerted activity in itself, an employee's earlier assertion of Section 7 rights weighs strongly in favor of concluding that the employee's later actions reflected an object of initiating, inducing, and preparing for group action—one of the very rights that the Act itself was designed to protect.

Fields providing Hyson with gas money, Hyson discussed with his Boone co-workers his view that it was unfair for Respondent to require them to provide gas money when Respondent should have been paying all employees for their travel.[15] Viewed in the totality of circumstances of this case, Hyson's statement to E'Amanda Walker and Fields is therefore far from an offhand gripe.[16] Rather, Hyson's entire course of conduct conclusively demonstrates that he sought to initiate, induce, or prepare for group action when he spoke with E'Amanda Walker and Fields regarding Respondent's travel pay policy.

E. Exception 5

1. Exception

Counsel for the General Counsel excepts to the ALJ's conclusion that Hyson's conduct was not undertaken for the purpose of mutual aid or protection. (ALJD at 15:6.)

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[15] The ALJ again erred when he noted that "there's no evidence of collective interest towards the Respondent's unpaid travel policy" to conclude that "[t]he facts do not demonstrate that Hyson was seeking to initiate or induce group action regarding travel pay." (ALJD at 16:5–7.) The ALJ's analysis overlooks long-standing Board precedent demonstrating that E'Amanda Walker and Fields "mild disinterest" is legally irrelevant to whether Hyson sought to initiate, induce, or prepare for group action. (Tr. 277:4; see, e.g., *Whittaker Corp*., 289 NLRB at 934 (explaining that other employees do not have accept an invitation to engage in activity for the invitation to be concerted); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) ("Inasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining by Section 7 of the Act if such communications are denied protection because of lack of fruition.").) But as a factual matter, E'Amanda Walker and Fields' disinterested response explains why Hyson did not immediately press his invitation to discuss employee rights and working conditions. Hyson simply never had another opportunity to renew his invitation or continue his campaign because Respondent terminated him the next day.

[16] The ALJ's analysis also did not explain why he erroneously viewed Hyson's statement to E'Amanda Walker and Fields as a "gripe." (ALJD at 15:41, 16:24–25.) The ALJ did not consider whether Hyson's earlier conversations with Weary and Stacey Walker weighed in favor of concluding that the object of Hyson's statement to E'Amanda Walker and Fields was initiating, inducing, or preparing for group action. Instead, the ALJ simply restated that "any inquiry into his coworkers pay did not amount to a group activity." (Id. at 16:29–30.) But regardless of the ALJ's circular and conclusory analysis, the record in the case firmly establishes the concerted nature of Hyson's May 15 statement to E'Amanda Walker and Fields.

2. Argument

The ALJ's conclusion is inconsistent with other statements within his decision, the facts of this case, and the Board precedent regarding the protected prong of the protected concerted activity analysis. Indeed, not even full page earlier in the decision, the ALJ stated that "As an employee, Hyson was entitled to engage in protected concerted activity pursuant to the rights guaranteed by Section 7 of the Act. Such activity includes the terms and conditions of employment, such as working hours, the physical environment, assignments, and responsibilities. Here, Hyson complained or inquired about wages and wage-related travel reimbursement polices, which encompass terms and conditions of employment protected by Section 7." (Id. at 14:14–20 (internal citations omitted).) Later in the decision, the ALJ specifically declined to analyze whether Hyson undertook activities for mutual aid and protection because the ALJ determined Hyson did not engage in concerted activity. (Id. at 16:38–39.)

Notwithstanding the ALJD's passing and conclusory statement at the outset of his analysis, the ALJ failed to analyze the mutual aid and protection prong of the protected concerted activity analysis. More importantly, the record establishes that Hyson engaged in activity for the mutual aid and protection of his co-workers. The Board has explained that the mutual aid and protection element focuses on the goal of the concerted activity: whether the action seeks to "improve terms and conditions of employment or otherwise improve [the employees'] lot as employees." *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). Here, the record conclusively establishes that Hyson acted to improve terms and conditions of employment or improve employees' lot as employees. It is axiomatic that wages and pay policies are terms and conditions of employment. When Hyson spoke with E'Amanda Walker and Fields regarding Respondent's travel pay

policy, he discussed not just his own terms and conditions of employment. Instead, Hyson specifically addressed the travel pay policy's impact on his coworkers when said he did not believe it was fair that Respondent asked E'Amanda Walker and Fields to provide gas money. Thus, the evidence demonstrates that Hyson acted for mutual and a protection when he spoke with E'Amanda Walker and Fields regarding Respondent's travel pay policy. Given Board precedent and facts of this case, the Board should reverse the ALJ and conclude that Hyson engaged in protected activity when he spoke with E'Amanda Walker and Fields on May 15.

F. Exception 6

1. Exception

Counsel for the General Counsel excepts to the ALJ's failure to conclude that Respondent mistakenly believed that Hyson engaged in protected concerted activity. (ALJD at 18:36–19:6.)

2. Argument

Paragraph 9(c) of the General Counsel's Amended Complaint alleged that Respondent violated Section 8(a)(1) when it terminated Hyson based on Respondent's mistaken belief that Hyson engaged in protected concerted activity. (GC Exh. 500 at 5.) In addition to the ALJ's erroneous conclusion that Hyson did not engage in protected concerted activity, the ALJ failed to analyze the General Counsel's mistaken belief theory at all. Nevertheless, the record contains ample evidence demonstrating that Respondent mistakenly believed that Hyson engaged in protected concerted activities.

Even absent protected concerted activity, an employer violates Section 8(a)(1) when it terminates an employee because the employer mistakenly believes the employee engaged in protected concerted activity. *See, e.g., United States Service Industries*, 314 NLRB 30, 30–31 (1994) (applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d (1st Cir. 1981), cert.

denied 445 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to a mistaken belief of protected concerted activity), enfd. 80 F.3d 558 (D.C. Cir. 1996) .

Here, the record demonstrates that Respondent mistakenly believed Hyson had spoken with E'Amanda Walker and Fields regarding their wages. As the ALJ found, E'Amanda Walker and Fields told Weary and Stacey Walker in post-workday telephone calls that Hyson had asked them about their wages during the week of May 13.[17] (ALJD at 7 fn. 23.) The record does not contain any corroborating evidence suggesting that E'Amanda Walker and Fields' hearsay statements should be credited for the truth of the matter asserted—that Hyson questioned E'Amanda Walker and Fields about their wages—but it is uncontroverted that Weary and Stacey Walker *heard* what E'Amanda Walker and Fields stated. Both Weary and Stacey Walker acted as Respondents' 2(11) supervisors and 2(13) agents under the Act. See discussion, infra, Exception 10 and Exception 12. Regardless of whether Hyson actually spoke with his Boone co-workers about their wages, Stacey Walker's testimony therefore indicates that Respondent mistakenly believed Hyson had spoken with E'Amanda Walker and Fields about their wages.

Further, Respondent's position statement and e-mail messages during the investigation demonstrate that Respondent mistakenly believed Hyson discussed wages with E'Amanda

[17] Although Stacey Walker testified that E'Amanda Walker and Fields stated that Hyson asked about their wages while on-the-clock, Stacey Walker acknowledged that she was not present for any conversation where Hyson asked E'Amanda Walker or Fields about their wages. (Tr. 398:6–7, 398:18–399:19.) Instead, Weary and Stacey Walker simply received E'Amanda Walker's account and Fields' account in post-workday telephone calls. Further, Respondent did not call either E'Amanda Walker or Fields as witnesses at the hearing to corroborate this account. In this regard, Stacey Walker's testimony regarding what E'Amanda Walker and Fields said cannot be used to prove the truth of the matter asserted—that Hyson asked E'Amanda Walker and Fields about their wages while on-the-clock. However, Stacey Walker's testimony can support a conclusion that Respondent mistakenly believed that Hyson had spoken with his coworkers regarding their pay.

Walker and Fields. In particular, Stacey Walker's signed letter included with Respondent's position statement explains that Hyson "continued to engage in conversation [sic] with other employees in regards to their pay" despite being instructed to speak with Weary if he had concerns. (GC Exh. 23 at 5.) Respondent's July 24 e-mail also identifies E'Amanda Walker as a person with whom Hyson had spoken. (GC Exh. 20 at 2.) In view of the above, the record supports concluding that Respondent mistakenly believed Hyson engaged in protected concerted activity by discussing wages with his Boone co-workers.

Moreover, Hyson's other workplace conversations after returning in late-April only further support a conclusion that Respondent mistakenly believed that Hyson discussed wages with E'Amanda Walker and Fields. As the ALJ correctly found as a matter of fact, Respondent knew that Hyson had also discussed Respondent's travel pay policy with E'Amanda Walker and Fields on May 15. (ALJD at 7 fn. 23.) As the ALJ also found, Respondent knew that Hyson discussed wages with Stacey Walker, characterized Respondent's wage discussion policy as unlawful under the NLRA, and sent Stacey Walker an article about NLRA rights on April 30. (Id. at 5:13–14.) Notwithstanding Weary's shifting and incredible claim that she was not aware that Hyson had criticized Respondent's policies, the ALJ also correctly found that Stacey Walker told Weary about Stacey Walker and Hyson's discussion of the travel pay policy on May 15. (Id. at 6:19.) Although Hyson's conversations with Stacey Walker cannot technically constitute protected concerted activity because Stacey Walker served as Respondent's supervisor under Section 2(11) of the Act, see discussion, infra, Exception 10; see also *Capital Times Co.*, 234 NLRB 309, 309–310 (1978) (explaining that employees cannot engage in protected concerted activities within the meaning of Section 7 with nonemployees who are not entitled to the protection of the Act), Hyson's repeated and credible inquiries to E'Amanda Walker, Fields, and

Stacey Walker established a pattern of advocating on behalf of employee rights outlined in the Act. Given that context, a reasonable inference should be drawn that Respondent mistakenly believed that Hyson discussed wages with E'Amanda Walker and Fields, and that Hyson's conversation was another step in Hyson's on-going campaign for employee rights. Thus, the record and reasonable inferences strongly support a conclusion that Respondent mistakenly believed that Hyson engaged in protected concerted activity by discussing his wages with E'Amanda Walker and Fields.

G. Exception 7

1. Exception

Counsel for the General Counsel excepts to the ALJ's failure to conclude that Respondent violated Section 8(a)(1) when it terminated Hyson because Hyson engaged in, or Respondent mistakenly believed that Hyson engaged in, protected concerted activities. (ALJD at 18:36–19:6.)

2. Argument

Because the ALJ erroneously concluded that Hyson did not engage in concerted activity, the ALJ did not specifically perform the knowledge, motivation, or affirmative defense portions of a *Wright Line* analysis. However, the ALJ's factual findings, legal conclusions, and the record in this case all conclusively demonstrate that Respondent knew that Hyson engaged in protected concerted activity, mistakenly believed that Hyson engaged in protected concerted activities, and that those activities at least partially motivated Respondent's decision to terminate Hyson. Moreover, the ALJ appropriately weighed the overwhelming record evidence to conclude that Respondent's affirmative defenses simply were not credible.

As a threshold matter, the ALJ correctly found that Stacey Walker informed Weary that Hyson had asked about her wages and e-mailed Stacey Walker an article regarding the Act on

April 30. (See id. at 5:6–14.) The ALJ also correctly found that Stacey Walker informed Weary regarding Hyson's May 15 complaints to Stacey Walker regarding the travel pay policy. (Id. at 7:9–19.) Further, the ALJ correctly found that E'Amanda Walker and Fields told Weary and Stacey Walker on May 15 that Hyson had complained about Respondent's travel pay policy and asked about their pay. (Id. at 7 fn. 23.) Given the ALJ's factual findings—not to mention Respondent's own June 24 position statement and abundant, credible record evidence—the Board should conclude that Respondent knew, or mistakenly believed, that Hyson engaged in protected concerted activity.

The evidence in this case also overwhelmingly establishes Hyson's protected concerted activity and Respondent's mistaken belief as to Hyson's activity motivated Respondent's decision to terminate Hyson on May 16. In fact, Respondent admitted as much in both Hyson's termination meeting and Respondent's initial position statement. Moreover, the indirect evidence regarding Respondent's pretextual and repeatedly shifting defenses, the timing of Hyson's termination, independent Section 8(a)(1) violations targeting the specific conduct for which Hyson was terminated, and Respondent's misplaced arguments all support a conclusion that Hyson's protected concerted activities and Respondent's mistaken belief that Hyson engaged in protected concerted activities motivated Respondent's decision to terminate Hyson.

Unlike many Board cases, the record includes direct evidence regarding Respondent's unlawful motivation. Here, the testimony regarding Hyson's May 16 termination meeting conclusively demonstrates Respondent's animus against Hyson's protected concerted activities and the activities in which Respondent mistakenly believed Hyson engaged.[18] Hyson and

[18] Each of the three participants in Hyson's termination meeting testified at the hearing, but only Hyson and Stacey Walker described the termination meeting itself. Although Weary was present for both Hyson and Stacey Walker's testimony and had the opportunity to present narrative

Walker each testified that Weary began Hyson's termination meeting by telling Hyson she was aware he had been speaking with co-workers regarding Respondent's policies about wage discussions and travel pay. Hyson testified that Weary stated he should have discussed his concerns with Weary and Weary alone.[19] Hyson further testified that Weary explicitly referenced Respondent's rule prohibiting the discussion of wages. According to Hyson, Weary stated that Hyson signed away his right to discuss wages when he signed the employee handbook. (Cf. GC Exh. 23 at 5 ("Mr. Hyson was not terminated for discriminatory reasons, but for reasons that violated the company policy which agreed to sign and adhere to. In no way was he (Mr. Hyson) forced to sign anything he wasn't in agreement with. Mr. Hyson had an understanding that discussing pay or anything that would make others feel uncomfortable was a violation of company policy.") Although Weary accused Hyson of stealing a blade from the Cricut machine without having previously spoken with him about it, Hyson's unrebutted testimony established that Weary only briefly mentioned the Cricut blade for a few minutes out of an hour-long meeting, and that Weary stated that she was *letting that issue go* because Hyson had discussed Respondent's policies behind her back and shown himself to be untrustworthy. (Tr. 282:14–18, 283:3–7; see also ALJD at 8:12–14 (explaining that Weary pivoted back to her

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testimony, Weary failed to present first-hand testimony about Hyson's termination meeting on May 16. The ALJ appropriately recognized that Weary failed to rebut Hyson's testimony regarding the termination meeting. (ALJD at 8 fn. 27.)

[19] Although Stacey Walker did not specifically testify that Weary told Hyson that he should have discussed his concerns with Weary alone, Stacey Walker did testify that she (Stacey Walker) asked Hyson why he had not followed Stacey Walker's repeated instructions to speak with Weary regarding his concerns about Respondent's wage discussion and travel pay policies. (Tr. 408:17–21, 409:16–24; see also 392:9–394:2 (instructing Hyson to speak with Weary after Hyson inquired about wage discussion or travel pay policies with Stacey Walker); Tr. 454:18–21 (instructing Hyson to bring his concerns regarding Respondent's wage discussion policy to Weary); GC Exh. 23 at 5 (explaining that Stacey Walker repeatedly instructed Hyson to discuss his concerns with Weary). Stacey Walker even testified that "I felt like if he had gone to her . . . with his concerns, it might have come out a different way." (Tr. 409:22–24.)

belief that Hyson was untrustworthy because he discussed Respondent's policies).[20]) Hyson also testified that Weary told him that Weary had no complaints about the quality of Hyson's work. Stacey Walker recalled Weary focusing on Hyson's criticisms of Respondent's policies and curriculum, as well as a passing question from Stacey Walker about the Cricut blade. Stacey Walker's testimony therefore supports a conclusion that the vast majority of Hyson's termination meeting targeted Hyson's protected concerted activities and Respondent's mistaken belief that Hyson engaged in other protected concerted activities. In view of the above, Hyson's and Stacey Walker's uncontroverted testimony demonstrate that Hyson's protected concerted activities and Respondent's mistaken belief that Hyson engaged in protected concerted activities motivated Respondent's decision to terminate Hyson.

Moreover, Respondent's June 24 position statement responding to the initial charge provided additional direct evidence of Respondent's unlawful motive in terminating Hyson. Respondent's position statement explicitly states that Respondent terminated Hyson for violating company policy prohibiting employees from discussing pay. (GC Exh. 23 at 4–5.) In addition to acknowledging that Respondent was aware that Hyson discussed terms and conditions of employment with his co-workers at Boone, Respondent states that Hyson "had an understanding

[20] A passage later in the ALJ's analysis observed that Weary discounted Respondent's passing accusation as a "secondary issue, simply calling [Hyson] untrustworthy for not bringing it to her attention—even though the credible evidence established that he told his coworkers that he would take care of replacing the missing piece of equipment." (ALJD at 17:36–38.) Read out of context, the ALD's observation might be construed as meaning that Weary let the issue go because Hyson failed to bring the blade to Weary's attention. But such a conclusion would be nonsensical in view of the record testimony and the ALJ's earlier factual findings. Thus, Hyson's unrebutted testimony—that Weary said she "was letting it go because she took issue with the fact that I was discussing these things behind her back, and that in doing so, I was showing myself to be untrustworthy . . . ." (Tr. 282:15–18)—should be construed as evidence that Hyson's conversations with his co-workers motivated Respondent's decision to terminate him, rather than the Cricut blade.

that discussing pay or anything that would make others feel uncomfortable was a violation of company policy." (Ibid.) Respondent also acknowledged that Hyson was creating "discord" in Respondent's company. (Id. at 4.) *Cf. Inova Health System*, 360 NLRB 1223, 1227 (2014) (concluding that an employer's reference to employee's activities as having affected morale support a conclusion that protected concerted activities motivated employer' adverse employment action), enfd. 795 F.3d 68 (D.C. Cir. 2015); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204–05 (2007) (concluding that an employer's reference to "'morale' issue" supported a conclusion that employee's protected concerted activity motivated employer's unlawful threat of unspecified reprisal), enfd. 519 F.3d 373 (7th Cir. 2008); *Mid-Mountain Foods*, 291 NLRB 693, 693, 699 (1988) (approving Administrative Law Judge conclusion that an employer's reference to "morale problems" supported a conclusion that protected concerted activity motivated the employer's adverse employment actions.); see also *Edward's Restaurant*, 305 NLRB 1097, 1097 fn. 1 (1992) (construing an employer's characterization of an employee as "'a disruptive force in the workforce'" as a reference to employee's protected concerted activity and evidence of the employer's unlawful motivation), enfd. sub nom. *Skyline Lodge, Inc. v. NLRB*, 983 F.2d 1068 (6th Cir. 1992). Regardless of any pretextual explanations Respondent later advanced, Respondent's position statement therefore admits that Hyson's protected concerted activity was a motivating factor in Respondent's decision to terminate Hyson.

In view of the above, the direct evidence in this matter overwhelmingly establishes Respondent's animus against Hyson's protected concerted activities and the protected concerted activities in which Respondent mistakenly believed Hyson engaged, and it is more than sufficient to meet the General Counsel's prima facie burden. Yet the indirect evidence adduced at hearing only further reinforces a conclusion that Respondent's animus against Hyson's protected

concerted activities motivated Respondent's unlawful decision to terminate Hyson rather than the scattershot, post-hoc excuses Respondent put forth at various points throughout this case.

The record firmly establishes that Respondent's shifting bases for terminating Hyson are pretextual and support an inference of an unlawful motive. As explained above, Weary focused intently on protected concerted activity during Hyson's termination meeting, briefly touching on Respondent's Cricut machine while explicitly stating it was *not* a reason for his termination and then returned to protected concerted activity.[21] Yet after Respondent received Hyson's charge alleging that Respondent interfered with protected concerted activity, Respondent submitted a position statement on June 24 that wholly omitted *any* reference to the Cricut machine. Respondent's omission is as telling as it is fatal to its case. Just five weeks removed from Hyson's termination—a time when Respondent's reasons would have remained crystal clear—Respondent failed to mention the Cricut machine when trying to explain its reasons for terminating Hyson to a federal government agency investigating Respondent's labor practices. Given Weary's wealth of experience as a business owner across several states, Respondent cannot credibly argue it did not recognize the importance of its response. Yet despite having received a text message regarding a misplaced (rather than stolen) Cricuit blade, Respondent *did not provide a copy of the message* to the federal agency investigating Respondent's decision to terminate Hyson or *mention the Cricut machine at all*. Notwithstanding the significant flaws that otherwise destroy the evidentiary weight that should be accorded to the May 15 text message exchange and demonstrating Respondent's Cricut machine arguments to be pretextual, see discussion, infra, Respondent's failure to include mention of the Cricut machine in its June 24

[21] In this regard, any other after-the-fact basis Respondent opportunistically claimed throughout this case—attendance, discord, or harassment—are facially pretextual in that they did not arise during Hyson's termination meeting at all.

position statement in itself exposes Respondent's "theft" justification as a wholly incredible and an entirely pretextual, post-hoc rationalization for its unlawful conduct.

Instead, Respondent's June 24 position statement hoped to explain away its unlawful motive with an entirely new set of pretextual justifications, claiming that Respondent terminated Hyson for "attendance issues" and "recording . . . during trainings," in addition to "caus[ing] discord in our company," while also acknowledging that Hyson was terminated because he violated Respondent's rule prohibiting wage discussions. (GC Exh. 23 at 4–5.) Respondent's reliance on wholly different bases that did not arise during Hyson's termination meeting constitutes a shifting defense and suggests that Respondent hoped to obscure its unlawful motive: Hyson's protected concerted activities and the protected concerted activities in which Respondent mistakenly believed Hyson had engaged.

The shift in Respondent's position statement was not its last. Instead, on July 31, Respondent's reasons again shifted to "harassing management."[22] (GC Exh. 21 at 2.) Although Respondent's July 31 e-mail message referenced "SEVERAL reasons" Respondent could have terminated Hyson, Respondent failed to specify *any* such reason—including the Cricut blade, Hyson's attendance, or recording during training. (Ibid.) Further, Respondent acknowledged that Respondent did not actually rely on any of those "SEVERAL reasons." (Ibid.) Instead, Respondent acknowledged that it "chose" Hyson's "harass[ment]" when it terminated him. (Ibid.) Respondent again omitted any reference to the Cricut machine in its September 20 e-mail

[22] Given Respondent's utter failure to present any evidence of "harassment," Respondent's repeated references instead highlight Respondent's disdain for Hyson discussing wages or terms and conditions of employment with anyone besides Weary. (See Tr. 281:14–17; see also discussion, supra, fn. 19.) In this regard, Respondent's self-serving and pretextual characterization reflects the depth of Respondent's animus against Hyson's protected concerted activities and the activities in which Respondent mistakenly believed Hyson had engaged.

message. (GC Exh. 22 at 1.) Rather, Respondent stated that Hyson "was fired based on how he harassed his manager." (Ibid.) Respondent further acknowledged that "[i]t's in writing and all these other reasons came out." (Ibid.) Thus, Respondent acknowledged that Respondent's "other reasons" were pretextual.

Respondent again shifted its defenses in its Answer to the Complaint. (GC Exh. 1–I at 7.) Gone were any references to attendance, recording, or "harassment." Instead, Respondent claimed *only* that Hyson had been "discharged due to theft of company equipment." (Ibid.) In fewer than six months, Respondent's claimed bases for terminating Hyson had therefore wholly shifted since Respondent's June 24 position statement. Respondent's ever-changing rationale for terminating Hyson only continued at hearing. At hearing, Respondent decided to again claim Hyson's attendance and an uninvestigated "theft" motivated Respondent's decision to terminate Hyson. (Tr. 470:10–13, 473:20; Respondent's E-Filed Closing Statement at 5–6.) Respondent's repeatedly shifting defenses therefore support a conclusion that Respondent's reasons are all pretextual. *See, e.g.*, *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007) (offering inconsistent or shifting reasons for a discharge supports an inference of pretext.)

The record also conclusively shows that Respondent's renewed post-Complaint emphasis on the Cricut machine to have been pretextual. Beyond Weary's explicit disavowal of the Cricut machine as a basis in Hyson's termination meeting and Respondent's failure to even *mention* the Cricut machine in its June 24 position statement, see discussion, supra, the lodestar of Respondent's Cricut machine rationale—a carefully cropped screenshot of a text message exchange with Stacey Walker—is fatally flawed. The screenshot Respondent presented completely excised *any* preceding or follow-up messages. Without more, it is unclear why Weary immediately concluded Hyson had stolen—rather than misplaced—the Cricut blade and

cartridge. It is also unclear whether Weary and Walker's larger exchange included a discussion of Hyson's protected concerted activities or the activities in which Respondent mistakenly believed Hyson had engaged. But given Respondent's admission that it destroyed the K-12 Coders Employee Handbook after receiving the initial charge in this case while preserving evidence that Respondent believed supports its defense, the Board should conclude that the May 15 screenshot does not tell the whole story.

But even without such context, the May 15 message suggests only that the Cricut blade and cartridge had been *lost*. The message provides no basis to conclude that the blade and cartridge were stolen. Respondent apparently hoped the Board would overlook the significant difference between lost and stolen. At hearing, Weary also claimed that Hyson could not have lost the Cricut blade and cartridge because it was not possible for the cartridge to fall out of the machine in transit to a K-12 Coders' job site at Boone. (Tr. 502:1–6.) Respondent apparently also hopes the Board would conclude that Hyson stole the blade. But Weary's claim simply ignored the record evidence. As the ALJ found as a matter of fact, one of Respondent's Cricut machines had been missing its blade for months and that machine had been inadvertently placed at Boone. (ALJD at 3:19.) Hyson acknowledged that he took the Cricut blade cartridge from a second Cricut machine so that Respondent's employees at Boone could complete the Cricut unit with students. Hyson also announced that he was taking the Cricut blade to those present at the time, initially placed the blade cartridge in his pocket, and then transferred the blade cartridge to one of Respondent's K-12 Coders backpacks. Indeed, Respondent's own evidence—Stacey Walker's text message—suggests that Hyson removed the blade from the second machine and placed it in his pocket. In this regard, Hyson appears to have been trying to find a solution to a problem. Hyson may have made missteps in the process, but the evidence does not support a

conclusion that Hyson stole the second Cricut blade. Rather, Respondent's argument that Hyson could not have lost the blade in transit either misunderstands or ignores the record evidence.

Further, Respondent presented no evidence—either testimonial or documentary—that Respondent ever investigated the misplaced equipment or which employees bore responsibility for misplacing the blade cartridge prior to Hyson's termination meeting. Instead, the record suggests that Respondent opportunistically seized on the May 15 text message as an after-the-fact disguise for Respondent's true motive: terminating Hyson because he engaged in, and Respondent mistakenly believed Hyson engaged in, protected concerted activities. Indeed, Respondent did not attach the screenshot to Respondent's initial position statement. That failure, alone, shows Respondent's post-hoc reliance on the May 15 text message to be pretextual.

Turning to other indirect evidence of motive in this matter, it is uncontroverted that Hyson spoke with Stacey Walker regarding Respondent's travel pay policy on May 15. The ALJ credited Stacey Walker's testimony that Weary explained that paying employees for their travel time would create a liability for Respondent. (Id. at 4 fn. 7.) Despite having the opportunity to question Stacey Walker and present Weary's testimony in narrative form, Respondent did not dispute Stacey Walker's testimony. Further, it is also uncontroverted that Respondent was aware Hyson had spoken with E'Amanda Walker and Fields regarding Respondent's travel pay policy on May 15. Given Weary's statement regarding the liability involved in paying employees for travel time, Respondent therefore had a powerful motive to discourage Hyson or any other employees from discussing the fairness and legality of Respondent's travel pay policy.

The record also demonstrates a close temporal proximity between Hyson's May 16 termination and Hyson's protected concerted activities, as well as the activities in which Respondent mistakenly believed that Hyson engaged. Regardless of any other pretextual bases

Respondent put forth in its scattershot effort to justify Respondent's decision to terminate Hyson after receiving Hyson's charge, the Board has long held that close proximity between protected concerted activities and an adverse employment action weigh in favor of concluding that the employer held animus against the protected activities in question. *See*, *e.g.*, *Advanced Masonry Associates, LLC*, 366 NLRB No. 57, slip op. at 3 (2018) (explaining that unlawful motivation may be inferred from suspicious timing), enfd. 781 Fed. Appx. 946 (11th Cir. 2019).

In addition, Respondent maintained an unlawful rule specifically prohibiting employees from discussing wages or terms and conditions of employment. (ALJD at 3:30–31, 10:23–11:20, 18:42–43; see *also* GC Exh. 21 at 2 (explaining that employees were prohibited from discussing "their contract, pay or anything else" with their co-workers).) Stacey Walker—Respondent's 2(11) supervisor and 2(13) agent—also made an unlawful statement to Hyson explicitly reiterating that employees were not permitted to discuss their pay with each other. (ALJD at 5:7–9, 18:43–44; see also discussion, infra, Exception 10.) Respondent's independent violations of Section 8(a)(1) therefore involve precisely the conduct—discussing wages and terms and conditions of employment—as Hyson's protected concerted activities. Moreover, Respondent's independent violations involve precisely the conduct in which Respondent mistakenly believed Hyson engaged. Accordingly, Respondent's independent violations of Section 8(a)(1) constitute an additional basis to conclude that Respondent held animus against Hyson's protected concerted activity and the activities in which Respondent mistakenly believed Hyson had engaged.

Perhaps sensing the weight of the evidence demonstrating Respondent's animus against protected concerted activity, Respondent claimed in vain that Respondent could not have had animus against Hyson's protected concerted activities because Respondent hired Hyson even after learning about Hyson's April 30 conversation with Stacey Walker. Respondent's claim is

unavailing on three fronts. First, as a threshold matter, Respondent's argument overlooks the difference between wage discussions with a 2(11) supervisor and wage discussions with rank-and-file employees. As the Board has repeatedly explained, an individual cannot engage in protected concerted activity with a supervisor. *Capital Times Co.*, 234 NLRB 309, 309–310 (1978). Accordingly, Stacey Walker's status as a 2(11) supervisor provides a critical distinction between Hyson's April 30 conversation with Stacey Walker and his later protected concerted activities with E'Amanda Walker and Fields.

More critically still, Respondent's misplaced argument that Hyson's April 30 conversation precludes a finding of animus against Hyson's protected concerted activity and Respondent's mistaken belief that Hyson engaged in protected concerted activity ignores the overall course of Hyson's campaign to advocate on behalf of employees. Although Hyson could not have engaged in protected concerted activity with a 2(11) supervisor like Stacey Walker as a matter of law, Hyson's April 30 conversation with Stacey Walker alerted Respondent that Hyson was an advocate for employee rights. Respondent may have been willing to permit Hyson some leeway for his April 30 conversation with Stacey Walker in the interest of staffing Respondent's locations and establishing proof of K-12 Coders' concept. But changes to the travel pay policy would create a significant new liability for Respondent's fledgling business. Respondent had also demonstrated such antipathy toward employee wage discussions that it created a handbook rule specifically prohibiting the practice. Accordingly, any self-interested leeway Respondent may have granted Hyson for his conversation with Stacey Walker on April 30 ended almost immediately after Hyson's employee advocacy campaign expanded to include Respondent's travel pay policy and his Boone co-workers. Respondent terminated Hyson *within a day* of Hyson's conversation with E'Amanda Walker and Fields, and *within a week* of mistakenly

coming to believe that Hyson had discussed wages with E'Amanda Walker and Fields. Rather than insulating Respondent from a conclusion that Respondent had animus against Hyson's protected activity, Respondent's knowledge that Hyson had discussed wages with Stacey Walker only set the fuse for Respondent's unlawful motive to explode when Hyson expanded his campaign to additional issues and Respondent's rank-and-file employees. In this regard, Respondent's knowledge that Hyson had spoken with Stacey Walker regarding her wages and employee rights under the Act therefore support a conclusion that Hyson's protected concerted activities and Respondent's mistaken belief that Hyson engaged in protected concerted activities motivated Respondent's decision to terminate Hyson.

More generally, Respondent's argument implies that an employer need only tolerate a single instance of protected concerted activities to insulate itself from all future claims of unlawful adverse actions.[23] But Respondent's hoped-for inference would be disastrous as rule of general application. Beyond providing ill-intentioned employers an enormous loophole that would eviscerate that Act, such an approach would also ignore that employers' motivations change over time. Indeed, the facts of this case demonstrate the flaws in Respondent's proposed inference. For example, Weary acknowledged that Respondent's operations were in constant state of flux as Respondent attempted to show proof of concept for K-12 Coders. In that context,

[23] Respondent also appeared to contend that Respondent could not hold animus against employee wage discussions because employee wage rates were common knowledge. But Respondent ignores the facts of this case. Notwithstanding Respondent's claimed disinterest, Respondent's maintained a rule specifically prohibiting employees from discussing wages. More fundamentally, Respondent's ill-conceived argument assumes that wage rates are perpetually fixed or stagnant. But as the Board has often observed, wage discussions are critical to employees' protected concerted activity. See, e.g., *Whittaker Corp.*, 289 NLRB at 934 (quoting *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) ("Dissatisfaction due to low wages is the grist on which concerted activity feeds."). Regardless of whether Hyson and his co-workers knew each other's starting wage rate, Respondent has a significant interest in suppressing employee wage discussions.

a single instance of protected concerted activity may not concern an employer—particularly when Respondent's 2(11) supervisor and 2(13) agent specifically instructs the employee that wage discussions are prohibited. But a sustained effort to discuss wages and working conditions may present on-going challenges for a growing and ever-changing business. In this regard, the repeated nature of Hyson's conversations provide an additional basis to differentiate Hyson's April 30 conversation with Stacey Walker from his later protected concerted activities involving his Boone co-workers. Considering the above, the record in this case overwhelmingly establishes that Hyson's protected concerted activity and Respondent's mistaken belief that Hyson engaged in protected concerted activity, motivated Respondent to terminate Hyson.

Turning the Respondent's affirmative defense burden under *Wright Line*, Respondent presented *no* specific evidence demonstrating that *any* of Respondent's related entities fired *any* employee for any conduct whatsoever. In fact, the only reference to any termination came in passing reference to Stacey Walker's responsibilities as a 2(11) supervisor. But Respondent presented no information about why—or, just as importantly, when—Respondent terminated any other employees. Absent details regarding even a single comparator showing prior consistent treatment, Respondent simply cannot meet its affirmative defense burden of showing it is more likely than not Respondent would have terminated Hyson even absent his protected concerted activity. Moreover, the ALJ specifically refused to credit Respondent's defenses. Indeed, the ALJ explicitly stated that Respondent's claimed affirmative defense—that Hyson sought to be discharged and was discharged based on his attendance and theft of Respondent's equipment "was not supported by the weight of the credible evidence." (ALJD at 14:45–15:1; see also id. at 17:40 ("[T]here is no evidence Hyson sought to be discharged."))

In view of the above, the Board should conclude that Respondent violated Section 8(a)(1) when Respondent terminated Hyson on May 16 because Hyson engaged in, and Respondent mistakenly believed Hyson engaged in, protected concerted activities.

H. Exception 8

1. Exception

Counsel for the General Counsel excepts to the ALJ's failure to draw an adverse inference from Weary's failure to rebut Hyson's testimony regarding his termination meeting. (Id. at 8 fn. 27.)

2. Argument

Thee ALJ appropriately noted observed that Weary did not dispute Hyson's testimony regarding his termination meeting. (Ibid.) However, the ALJ erred when he failed to draw an adverse inference that Weary's testimony would have been adverse to Respondent case. See, e.g., *Asarco, Inc.*, 316 NLRB 636, 636, 640 (1995) (approving Administrative Law Judge's decision to draw negative inferences from an employer witness's failure to deny specifics.), enf. denied on other grounds 86 F.3d 1401 (5th Cir. 1996).

I. Exception 9

1. Exception

Counsel for the General Counsel excepts to the ALJ's failure to draw adverse inferences that Respondent did not receive complaints about Hyson or seek details from E'Amanda Walker or Fields regarding the missing Cricut blade. (ALJD at 15:1.)

2. Argument

Although the ALJ appropriately found Respondent's excuses for terminating Hyson to be non-credible (ibid.), Respondent's deficient subpoena production only further supports an inference that Respondent seized on the Cricut machine as a convenient explanation for its

unlawful decision to terminate Hyson for engaging in protected concerted activities and because Respondent mistakenly believed Hyson engaged in protected concerted activities. The General Counsel's subpoenas duces tecum specifically requested documents underlying any investigation of Hyson, as well as documents Respondent relied upon deciding to discharge Hyson, copies of any and all complaints regarding Hyson, and documents discussing complaints, and documents regarding the Cricut machine. (GC Exh. 200 at 9, 20, 31, 41; GC Exh. 201 at 8; GC Exh. 202-B at 8; GC Exh. 203 at 8.; GC Exh. 205 at 5–6, 13–14, 21–22, 29–30; GC Exh. 206 at 4–5; GC Exh. 207 at 4–5; GC Exh. 208 at 4–5; GC Exh. 209 at 4–5.)

But at hearing, Weary acknowledged that in response to any subpoena paragraph, she searched only her careerleaders.com e-mail account for the names "Matthew Hyson" and "Stacey Walker," as well as her text messages with Stacey Walker and Hyson.[24] (Tr. 201:3–25, 203:5–204:3, 204:10–205:3.) Weary also acknowledged that she could not recall what efforts she undertook to search files maintained in Respondent's computer and cloud storage services, and she denied maintaining any physical records. (Tr. 205:20–206:15, 212:14–19.) The record evidence overwhelmingly establishes Respondent's unlawful motive in terminating Hyson. See discussion, supra, Exception 7. Nevertheless, the Board should draw an adverse inference from Respondent's contumacious failure to comply with the General Counsel's subpoena. See *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 1 fn. 1, 14 fn. 29 (2018) (approving administrative law judge decision that employer's contumacious failure to produce subpoenaed records regarding supervisory status issues warranted an adverse inference); *Metro-West*

[24] Despite the General Counsel's detailed subpoena requests, Respondent explained that it limited its search for documents to Weary's thecareerleaders.com e-mail address and Weary's text exchanges with Hyson and Stacey Walker. (Tr. 199:7–201:18, 202:25–205:3.) In this regard, Respondent did not produce—or even search for—any text messages, hand-written notes, or e-mail messages with E'Amanda Walker or Fields.

Ambulance Services, 360 NLRB 1029, 1030 & fn. 13 (2014) (finding Board may appropriately draw an adverse inference for subpoena non-production where the administrative law judge concluded an adverse inference was unnecessary to decide that the employer failed to establish an affirmative defense).

Moreover, Respondent did not call either E'Amanda Walker or Fields. Although Respondent explained the extremely difficult and heartbreaking circumstances current employee Fields faced at the time of hearing, Respondent made no request to continue the trial until the Employer could arrange for her testimony. Moreover, Respondent apparently made no effort to subpoena or otherwise have E'Amanda Walker testify despite having three months to prepare for hearing. In this regard, the Board should likewise draw an adverse inference from Respondent's failure to call E'Amanda Walker or Fields. See, e.g., *Equinox Holdings, Inc.*, 365 NLRB No. 103, slip op. at 1 fn. 1 (2016) (concluding an adverse inference is appropriate where employer failed to call employee witnesses who had made a complaint about a co-worker).

J. Exception 10

1. Exception

Counsel for the General Counsel excepts to the ALJ's failure to conclude as a matter of law that Stacey Walker acted as Respondent's 2(11) supervisor and 2(13) agent. (ALJD at 18:36–19:6.)

2. Argument

The Amended Complaint specifically alleged that Stacey Walker was Respondent's supervisor under 2(11) of the Act and agent under Section 2(13) of the Act. (GC Exh. 500 at 4.) The ALJ correctly found that Respondent made Stacey Walker responsible for attendance and scheduling when Respondent promoted Stacey Walker to STEM Aide Supervisor in April. (ALJD at 5 fn. 12.) The ALJ also correctly found that Respondent authorized Stacey Walker to

hire, discipline, and recommend the termination of employees in about May. (Ibid.) Further, the ALJ found that Stacey Walker acted as Respondent's "point person" for Respondent's smartphone timekeeping application. (Ibid.) Later in the ALJD, the ALJ observed that "Hyson's discussion on whether Stacey Walker received a raise when she was promoted occurred after the supervisor's change in job title and duties and removed her from employee status. As such, Hyson's initial conversation about wages and hours was not concerted action with another employee." (Id. at 16:13–15.) The ALJ further observed that "[b]ecause these actions occurred with a supervisor instead of an employee, Hyson's actions did not amount to concerted activity." (Id. at 16:18–20.) Moreover, the ALJ's factual findings explained that on April 30, Stacey Walker stated "the Respondent's employment policy prohibited employees from discussing wages with each other." (Id. at 5:6, 5:8–9.) The ALJ's conclusions of law also state, in reference to Stacey Walker's conversation with Hyson, that Respondent "violated Section 8(a)(1) of the Act by . . . telling employees on April 30, 2019 that Respondent's rules prohibit employees from discussing their wages." (Id. at 18:43–44.)

In this regard, the ALJ appears to have determined that Stacey Walker acted as Respondent's statutory supervisor under Section 2(11) and agent under Section 2(13). However, the ALJ failed to include his determination as a formal conclusion of law. Given the ample record evidence regarding Stacey Walker's responsibilities as a STEM Aide Supervisor, as well as the ALJ's other factual findings and conclusions of law, the Board need not remand this case for the ALJ. Instead, the Board should amend the ALJ's conclusions of law to include a conclusion that Stacey Walker acted as Respondent's statutory supervisor and agent.

K. Exception 11

1. Exception

Counsel for the General Counsel excepts to the ALJ's failure to draw adverse inferences as to Stacey Walker's status as a 2(11) supervisor and 2(13) agent in view of Respondent's contumacious subpoena responses. (Id. at 5 fn. 12.)

2. Argument

Given the ALJ's findings and conclusions regarding Stacey Walker's responsibilities and in the interest of concision, this Brief in Support of Exceptions does not include a point-by-point analysis of the record evidence demonstrating Stacey Walker's 2(11) and 2(13) status. But the ALJ made an additional technical error when he failed to draw an adverse inference from Respondent's inadequate and contumacious subpoena response.[25] To the extent the Board

[25] The General Counsel requested an array of documents that would have supported the Amended Complaint's allegations as to Stacey Walker's 2(11) and 2(13) status. (See GC Exh. 200 at 7–8, 18–19, 29–30, 39–40; GC Exh. 201 at 6–7; GC Exh. 202-B at 6–7; GC Exh. 203 at 6–7.) At hearing, Weary acknowledged that Respondent's search for responsive documents was severely limited. See discussion, supra, Exception 9.

Although Weary claimed to have provided "anything" pertaining to Stacey Walker, Stacey Walker credibly testified that Weary regularly communicated with Stacey Walker via text message and the careerleaders.com e-mail address that Weary created for Stacey Walker after becoming the STEM Aide Supervisor. (Tr. 198:23–199:1, 383:3–19.) Stacey Walker also credibly testified that her exchanges with Weary included hiring discussions and business operations. (Tr. 383:21–22). Despite the General Counsel's detailed requests, Weary's acknowledgement that she communicated with Respondent's staff via text message and e-mail (see Tr. 194:23–195:3, 201:19–25), and Weary's testimony that she maintains copies of e-mail messages back to 2009 (see Tr. 198:22–199:11), the single e-mail or text exchange with Stacey Walker that Respondent produced was Stacey Walker's out-of-context text-message explanation that the Cricut blade cartridge had been misplaced.

Likewise, Respondent produced no text message or e-mail exchanges with any other employees besides Hyson. Nevertheless, Weary sent text and e-mail instructions to Hyson stating that Weary no longer handled attendance issues and that Hyson should contact Stacey Walker regarding attendance. Weary's messages with Hyson therefore support a conclusion that Weary communicated similar information to other employees. In fact, Respondent elicited testimony from Stacey Walker that Weary provided Stacey Walker with a copy of the same payroll schedule Weary had e-mailed to Hyson. (Tr. 446:23–447:6; see also GC Exh. 33 (showing a payroll schedule Weary e-mailed to Hyson).) Such consistency in communication

concludes that it must decide Stacey Walker's status, the Board should draw an adverse inference against Respondent in view of its wholly inadequate response to the General Counsel's detailed and validly issued subpoenas duces tecum seeking documents relevant to Stacey Walker's supervisory and agency status. See *Metro-West Ambulance Services*, 360 NLRB 1029, 1030 & fn. 13.

L. Exception 12

1. Exception

Counsel for the General Counsel excepts to the ALJ's failure to conclude as a matter of law that Tarsha Weary acted as Respondent's statutory supervisor and agent under Section 2(11) and 2(13) of the Act. (See ALJD at 18:36–19:6.)

2. Argument

The Amended Complaint specifically alleged that Tarsha Weary acted as a 2(11) supervisor and a 2(13) agent. (GC Exh. 500 at 4.) Although the ALJ correctly found, as matter of fact, that Weary had created each of the entities involved in this matter, makes all of the business decisions for K-12 Coders and Interns4Hire, and hires all of Interns4Hire's employees (ALJD at 2:30–3:8), he inadvertently failed to conclude that Weary acted as Respondent's

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therefore suggests that Weary would have provided similar instructions to other employees regarding their interactions with Stacey Walker. Such evidence would likely have reinforced—and shed additional light on—Stacey Walker's responsibilities as a STEM Aide Supervisor. The Board does not relax its subpoena response rules for employers proceeding pro se. The standard remains the same: produce responsive documents. Despite Weary's repeated claim that Respondent provided all "relevant" documents, Weary's admissions regarding Respondent's search for documents demonstrate Respondent's efforts to comply with the subpoenas were woefully inadequate. Instead, it appears that Respondent may have simply produced evidence Respondent believed helpful to Respondent's case.

If the Board declines simply to correct the ALJ's seemingly inadvertent omissions as to Stacey Walker's supervisory and agency status, the Board should therefore draw an adverse inference that a complete subpoena response would have provided additional evidence that Stacey Walker acted as Respondent's supervisor and agent. See, e.g., *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 1 fn. 1, 14 fn. 29 (2018).

supervisor and agent under Section 2(11) and 2(13). The ALJ's factual findings again leave no doubt as to Weary's supervisory or agency status. Thus, the Board should correct the ALJ's inadvertent omission and clarify in its decision that Weary acted as Respondent's 2(11) supervisor and 2(13) agent.

M. Exception 13

1. Exception

Counsel for the General Counsel also excepts to the ALJ's failure to rule on counsel for the General Counsel's Motion to Correct the Record. (See generally ALJD.)

2. Argument

On April 24, Counsel for the General Counsel filed and served two motions. First, counsel for the General Counsel filed a Motion to Amend the Amended Complaint. Second, counsel for the General Counsel filed a Motion to Correct the Record requesting minor corrections to the transcript in this matter. Neither Hyson nor Respondent filed an opposition to either motion. Although the ALJ granted the General Counsel's Motion to Amend the Amended Complaint, see ALJD at 20 fn. 31, the ALJ inadvertently failed to rule on the Motion to Correct the Record. Accordingly, counsel for the General Counsel requests that the Board correct the ALJ's inadvertent oversight and grant the Motion to Correct the Record. See, e.g., *Dorey Electric Co.*, 312 NLRB 150, 150 fn. 1 (1993) (granting, in a Board decision, motions to strike upon which the administrative law judge had failed to rule).

N. Exception 14

1. Exception

Counsel for the General Counsel also excepts to the ALJ's failure to set forth the method for making Hyson whole for any loss of earnings and other benefits suffered as a result of Respondent's unfair labor practice. (ALJD at 19:10–15; 20:2–4.)

2. Argument

The ALJ ordered Respondent to "Make [Hyson] whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision." (ALJD at 20:2–4.) However, the ALJD's remedy section inadvertently omitted any description of the method for making Hyson whole.[26] (ALJD at 19:10–15.) Because the Board's remedies for unlawful terminations are standard, the Board need not remand this matter for the ALJ to clarify his order in the in the first instance. Instead, the Board should simply order that Respondent compensate Hyson with its standard backpay, reinstatement, search-for-work and interim employment expense, adverse tax consequence remedies for unlawful termination and explain the method for calculating the amounts owed to Hyson.

Dated at Washington, D.C., this 27th day of July 2020.

Respectfully submitted,

/s/ **Paul J. Veneziano**

Paul J. Veneziano
Counsel for the General Counsel
Washington Resident Office
1015 Half Street SE, Suite 6020
Washington, D.C. 20570
paul.veneziano@nlrb.gov

[26] The General Counsel agrees with *King Soopers* to the extent that it calculates the expenses related to search-for-work and interim employment expenses separately from lost wages. However, the General Counsel believes that in no case should a discriminatee separately recover search-for-work or interim employment expenses if the discriminatee's interim earnings exceed the sum of lost wages and work-search/interim expenses. See *King Sooper's, Inc.*, 364 NLRB No. 93, slip op. at 14 n.16 (Aug. 24, 2016) (Chairman Miscimarra, dissenting).

CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Exceptions and Brief in Support was filed electronically on July 27, 2020, and, on the same day, copies were electronically served on the following individuals by e-mail:

Ms. Tarsha Weary
Director of Operations/Executive Director/CEO
SW Design School LLC, d/b/a Interns4Hire.com
and d/b/a K-12 Coders, and SW Design School, L3C
tarsha@thecareerleaders.com

Mr. Matthew Hyson
11402 Old Fredrick Road
Marriottsville, MD 21104
mhyson@gmail.com

Dated at Washington, D.C., this 27th day of July 2020.

Respectfully submitted,

/s/ **Paul J. Veneziano**

Paul J. Veneziano
Counsel for the General Counsel
Washington Resident Office
1015 Half Street SE, Suite 6020
Washington, D.C. 20570
paul.veneziano@nlrb.gov